



Thirty Years of Environmental Protection Law in the Supreme Court (1999 Garrison Lecture)

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Fifth Annual Lloyd K. Garrison Lecture on Environmental Law

Thirty Years of Environmental Protection Law in the Supreme Court

RICHARD J. LAZARUS*

It is an honor to present a lecture named after Lloyd Garrison and to be here at Pace Law School. It is especially fitting, of course, that the first Garrison Lecture was presented by Pace's own David Sive. Professor Sive, as we all know, worked closely with Garrison on the celebrated *Scenic Hudson* litigation.¹ Few legal counsel have been so closely identified with the emergence of the environmental law profession during the past three decades. Indeed, if there were such a thing as a legal thesaurus that linked substantive areas of law with lawyers and one looked up "environ-

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* John Carroll Research Professor of Law, Georgetown University Law Center. This article and the underlying factual information was first presented at Pace Law School on March 11, 1999, as the Fifth Annual Lloyd K. Garrison Lecture on Environmental Law, but has been updated in light of a few events occurring subsequent to that presentation. Because this lecture does not lend itself to a full presentation of the statistical compilation of United States Supreme Court rulings underlying the lecture or to a complete elaboration of the related analysis, that fuller version is being separately published. See Richard J. Lazarus, *Restoring What's "Environmental" About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000). Special thanks are owed to Staci Krupp, J.D. Candidate 2000, Georgetown University Law Center, and Alex Steffan, J.D. 1999, Georgetown University Law Center, who provided excellent research assistance in the preparation of the initial lecture and this article. This article discusses Supreme Court decisions in many cases, including some in which I served as counsel for parties involved in the litigation. The views expressed in this article are my own and do not necessarily reflect the views of those parties I represented.

1. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

mental law," its first synonym would undoubtedly be "David Sive."²

I do not and could not, however, make claim to the extraordinary pedigree of David Sive: One of the first of the very first generation of modern environmental lawyers in this country. Nor can a fair comparison be made to the other three Garrison Lecturers who preceded me: Professors Joe Sax, Bill Rodgers, and Oliver Houck. These are true pioneers. They inspired much in the formation of modern environmental protection law, and have served since in their scholarship and their legal counsel as the law's guardians and promoters.

But what I strive to claim is a close lineage, as the first of the second generation of environmental lawyers and scholars to deliver this lecture. I use the term "lineage" deliberately. For although I did not then know any of them by name, it was the work of Lloyd Garrison, David Sive, and the others that resulted in my own decision to engage in the study and practice of environmental law.

I made my decision to become an environmental lawyer during my freshman year in college in 1971, because of the events then occurring in our nation. Like many of my contemporaries in environmental law, I saw as my role models those environmental law activists who seemed to be shaping the nation's future in necessary and positive ways. So it should be no surprise that I feel a great debt to those who preceded me as Garrison lecturers, and to Lloyd Garrison, whom I never had the pleasure to meet.

As much as I deliberately, if not obsessively, struck a path of becoming an environmental lawyer and law professor twenty-eight years ago, the actual direction of that path has necessarily been the result of much happenstance and fortuity. One bit of good fortune has been my consistent involvement with the U.S. Supreme Court, both as a practicing lawyer and a legal academic.³

This lecture stems from that work by examining the Supreme Court's role in environmental law's evolution during the past

2. Professor Sive is often referred to as the "father of environmental law." See Margaret Cronin Fisk, *Profiles in Power 100—The Most Influential Lawyers in America*, NAT'L L.J., March 25, 1991, at S2.

3. I joined the Department of Justice in the fall of 1979, after law school graduation. The Court soon after granted review in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), for which I was assigned responsibility for drafting the position of the United States as *amicus curiae*. Since then, I have had the opportunity to represent the federal government, state and local governments, and environmental groups in a host of cases before the Supreme Court.

thirty years, as reflected in the Court's decisions and the votes of the individual Justices. My view is that those decisions and votes increasingly suggest a lack of appreciation of environmental law as a distinct area of law.

This lecture's objectives are three-fold. The first is perhaps somewhat pedantic, but both revealing and even entertaining for those (like me) who are preoccupied with the Court. It is to highlight some facts and figures about the past thirty years of environmental and natural resources law cases before the Court that tell much about the Court and the individual Justices.

The second objective is to suggest what the Court's decisions tell us about the nature and practice of environmental law. This includes how environmental law relates to other areas of law with which it inevitably and repeatedly intersects. It also includes lessons regarding how, accordingly, law students who seek to become environmental lawyers should approach the study of law. It likewise extends to how environmental lawyers seeking to promote environmental protection and resource conservation can be the most effective in litigation.

The third and final objective is more modest. It is to describe a potentially significant case that the Court heard during the October 1999 Term. The case was important because at stake was the future role of citizen suit enforcement in environmental law, which has long been one of environmental law's essential hallmarks.⁴ More broadly, however, the case proved significant because it provided the Court with a much needed opportunity to reverse the disturbing trend discernible in its precedent and to restore what is "environmental" about environmental law.

I. A Scorecard Of The Justices' Votes In Environmental Cases

Commencing with the Supreme Court's October Term 1969, the Court has decided over 240 environmental and natural resources law cases on the merits.⁵ There are a host of intriguing

4. See *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA ADMINISTERED STATUTES* (Environmental Law Institute 1984).

5. A listing of the cases is included in an appendix to this article. Whether a case is considered "environmental" for the broader purposes of this threshold inquiry turns on whether environmental protection or natural resources matters are at stake. The legal issue before the Court need not independently have an environmental character to it. The stakes themselves are sufficient to invoke the label. The Garrison Lecture upon which this article is based was delivered on March 11, 1999. Since then, the Supreme Court has decided two additional environmental cases, *City of Monterey v.*

factual inquiries that could be undertaken concerning these rulings. This lecture, however, focuses on only three: (1) which Justices wrote the most decisions for the Court during the past thirty years; (2) which Justices have been in the majority the most frequently; and (3) which Justices have tended to vote for outcomes that are more rather than less protective of the environment, and which Justices have tended to do the converse (that is, less rather than more).

A. Justice White: The Justice Who Wrote the Most Environmental Decisions For the Court

In tallying which Justice has written the most environmental opinions for the Court during the past thirty years, one might fairly anticipate that the opinions would be split roughly evenly with Chief Justice Rehnquist leading the pack. After all, the Chief Justice has served longer on the Court than anyone presently there and his tenure virtually spans the relevant time period, with his joining the Court as a Justice in 1971. But it is in fact neither the Chief Justice leading the pack nor is it even a close question as to who has written the most environmental opinions for the Court. Nineteen Justices have served on the Court during the relevant time period⁶ and Justice White, who left the Court in 1993, is the leading opinion writer for the Court by a large margin.

Justice White wrote thirty-six opinions. The next closest is Justice O'Connor with twenty-two opinions for the Court. How is that revealing? What philosophy does one think about Justice White and environmental protection? The fairest answer is none at all.

Justice White harbored no particular interest in environmental law. His opinions are dispassionate, dry, and formalistic, with little effort to elaborate any particular philosophical vision. In this respect, moreover, his environmental law opinions do not differ from his opinions for the Court generally, which a recent biog-

Del Monte Dunes, 119 S. Ct. 1624 (1999), and *Amoco Production Co. v. Southern Ute Tribe*, 119 S. Ct. 1719 (1999), which have been added to the database and, when relevant, to the discussion in the text of this article.

6. These Justices are: Harlan, Black, Douglas, Stewart, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, and there have been two Chief Justices, Burger and Rehnquist.

raphy describes as evidencing little "elaboration of philosophical vision"⁷ and "never aspiring beyond plain, workmanlike prose."⁸

Justice White's controlling philosophy (or lack thereof) is exemplified by his votes in three cases during the 1986 October Term. The Supreme Court during that term handed down the so-called "Takings Trilogy," three cases raising Fifth Amendment regulatory takings challenges to environmental restrictions: *Key-stone Bituminous Coal Ass'n v. DeBenedictis*,⁹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹⁰ and *Nollan v. California Coastal Commission*.¹¹ The juxtaposition of these three cases presented a true jurisprudential paradox and certainly no readily discernible, coherent view of the Takings Clause.¹²

Nor do White's opinions for the Court otherwise suggest any distinct vision of the role of law in environmental protection. The Official Papers of Justice Thurgood Marshall provide another clear example. In *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*,¹³ Justice White wrote for the Court's slim five-Justice majority an opinion that upheld the United States Environmental Protection Agency's (EPA) construction of the Clean Water Act. As disclosed by the Marshall Papers, however, he did so only after concluding that there is "little or no difference in principle" between the opposing arguments and that "administrative law will not be measurably advanced or set back however this case is decided."¹⁴ White did not see the case, whichever way it was decided, as being of significant import. The case presented only a narrow, fact-bound issue regarding the sufficiency of an administrative record.

7. DENNIS HUTCHINSON, *THE MAN WHO ONCE WAS WIZZER WHITE* 451 (1998) (quoting Kate Stith, *Byron White: Last of the New Deal Liberals*, 103 YALE L.J. 19 n.1 (1993)).

8. *Id.* at 454.

9. 480 U.S. 470 (1987).

10. 482 U.S. 304 (1987).

11. 483 U.S. 825 (1987).

12. See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1625 (1988).

13. 470 U.S. 116 (1985).

14. Letter from Justice Byron R. White to The Chief Justice, Re: 83- 1013—*Chemical Manufacturers Ass'n v. NRDC* (November 13, 1984) (Official Papers of the Chambers of Justice Thurgood Marshall).

B. Justice Kennedy: The Justice Most Often in the Majority in Environmental Cases

Another revealing factual inquiry concerns the frequency with which individual Justices were in the majority in environmental cases during the past thirty years. Not surprisingly, Justice White's percentage for being in the majority is very high; he voted with the majority 89.2% of the time. His being in the majority so often may also provide a neutral explanation for why White authored so many opinions for the Court. But opportunities and opinions do not necessarily go hand-in-hand. Chief Justice Warren Burger, for instance, had an even higher percentage for being in the majority and wrote far fewer opinions. The Chief Justice was in the majority in over 91.5% of the 140 environmental cases in which he participated. Yet he wrote only eight opinions for the Court.

The most telling fact about the tendency of Justices to vote in the majority, however, does not relate to either Chief Justice Burger or to Justice White. The Justice with the most astounding record for being in the majority is Justice Kennedy. Kennedy has participated in fifty-seven cases to date. Other than an original action of interstate water dispute,¹⁵ he has dissented only once, in *Pennsylvania v. Union Gas Co.*¹⁶ The Court, moreover, has since overruled its eleventh amendment decision in *Union Gas*.¹⁷ So, in effect, Justice Kennedy's record is virtually 100% (putting aside a couple of somewhat qualified concurring opinions).¹⁸

But how many opinions for the Court has Justice Kennedy written? One might expect as many as ten but certainly no fewer than six. But, in fact, until the Court's most recent term, Kennedy had written only two opinions for the Court.¹⁹ He added two more this past Term.²⁰ Kennedy supplied, moreover, the deciding fifth vote in three out of those four cases.

15. See *Oklahoma v. New Mexico*, 501 U.S. 221 (1991).

16. 491 U.S. 1 (1989).

17. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

18. During the October 1991 Term, Justice Kennedy filed a concurring opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which also joined Justice Scalia's majority opinion with some qualifications, and a concurring opinion in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992), which joined only in the judgment.

19. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

20. The third and fourth cases were both decided after the formal presentation of the Garrison Lecture this past March. See *City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624 (1999); *Amoco Production Co. v. Southern Ute Tribe*, 119 S. Ct. 1719 (1999).

This is a striking result. The most significant vote has little direct expression in the Court's opinion writing. Justice Kennedy is the key to the majority in environmental protection and natural resources law cases today. Yet he almost never writes an opinion for the Court on these issues.

The upshot is the exacerbation of the Court's longstanding lack of environmental voice. Justice White, who wrote most of the opinions, did not provide it. Justice Kennedy, who now appears to reflect the controlling philosophy for the Court in these cases, has similarly not yet expressed an overarching view of the environmental law field. He has instead, like White during the 1970s and 1980s, simply joined opinions that, because they are the products of shifting majority coalitions, lack any consistent or coherent theme.

C. Justice Douglas vs. Justice Scalia: Scoring the Justices on Environmental Protection

The last categorical inquiry concerns the voting patterns of individual Justices based on the relationship of their votes to environmental protection objectives. When do their votes promote environmental protection? And when do their votes appear to undercut it?

Most Court observers' intuitions regarding the Justices would likely be that those Justices who are considered "liberal" cast votes in favor of environmental protection concerns, while those more "conservative" members of the Court do not. To test that hypothesis, I undertook two detailed analyses of the votes of the Justices—one more qualitative and the other striving to be quantitative. Interestingly, the more qualitative analysis questions the intuitive view, while the more quantitative approach restores some of its force. Each is discussed next.

1. What is most immediately suggested by an admittedly unscientific, impressionistic review of the votes of individual Justices in environmental cases is the wholly paradoxical nature of the voting patterns if assessed exclusively from an environmental protection perspective.²¹ The votes of a few Justices in selected cases are illustrative.

21. My conclusions in this single respect are strikingly similar to those drawn by Professor Sive, based on his review in 1994 of the Supreme Court's environmental law rulings in the October 1993 Term. Remarking upon the odd voting patterns of individual Justices in those cases, Professor Sive characterized environmental cases as making for "strange judicial bedfellows" that Term. See David Sive & Daniel Riesel,

Chief Justice Rehnquist, for instance, has a reputation in the environmental community for being unsympathetic to environmental protection concerns. There are his votes against more expansive federal reserved water rights in national forests in *United States v. New Mexico*;²² against enhanced procedural rights for environmentalists in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*;²³ against endangered species protection in *Tennessee Valley Authority v. Hill*;²⁴ and in favor of a more aggressive regulatory takings test in both *Penn Central v. City of New York*²⁵ and *Keystone Bituminous Coal Ass'n v. DeBenedictis*.²⁶

Labeling the Chief Justice as somehow "anti-environmental" is problematic because many of his votes support environmentalist causes. He voted to uphold environmental criminal convictions in *United States v. Pennsylvania Industrial Chemical Corp.*;²⁷ supported the validity of stricter local noise controls in *City of Burbank v. Lockheed Air Terminal*;²⁸ concluded that federal installations must comply with state air pollution control requirements in *Hancock v. Train*²⁹ and joined the dissenters in *Japan Whaling Ass'n v. American Cetacean Society*³⁰ in contending that the U.S. Secretary of Commerce was required to certify Japan for failing to comply with International Whaling Convention whaling quotas. Indeed, Chief Justice Rehnquist's dissenting opinions in a series of Dormant Commerce Clause cases stress the importance of the environmental protection goals as an affirmative reason for upholding the challenged governmental action.³¹

Similar crisscrossing tendencies are evident in the votes of Justice Stevens, who is generally considered sympathetic to environmental protection concerns. Stevens' opinions, widely hailed

An Analysis of the Justices' Positions in Environmental Cases Demonstrates that Doctrinal Classifications Aren't Very Useful, NAT'L L.J., October 3, 1994, at B5.

22. 438 U.S. 696 (1978).

23. 435 U.S. 519 (1978).

24. 437 U.S. 153, 211 (1978) (Rehnquist, J., dissenting).

25. 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting).

26. 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting).

27. 411 U.S. 655, 676 (1973) (Rehnquist, J., dissenting).

28. 411 U.S. 624, 640 (1973) (Rehnquist, J., dissenting).

29. 426 U.S. 167, 199 (1976) (Rehnquist, J., dissenting).

30. 478 U.S. 221, 241 (1986) (Rehnquist, J., dissenting).

31. See *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (Rehnquist, J., dissenting); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 349 (1992) (Rehnquist, C.J., dissenting); *Oregon Waste Systems v. Oregon*, 511 U.S. 93, 108 (1992) (Rehnquist, C.J., dissenting).

by the environmental community, include his opinion for the Court in *Keystone Bituminous Coal Ass'n*,³² and his dissents in *Nollan v. California Coastal Commission*,³³ *Lucas v. South Carolina Coastal Council*,³⁴ *Weinberger v. Romero Barcelo*,³⁵ and *Secretary of the Interior v. California*.³⁶

But environmentalists do not similarly acclaim Stevens' dissents in *California Coastal Comm'n v. Granite Rock*,³⁷ favoring preemption of state environmental regulation of mining activities on federal land; in *Penn Central*, against the constitutionality of a state historic landmark designation challenged as a regulatory taking;³⁸ and in *Environmental Defense Fund v. City of Chicago*,³⁹ rejecting the Environmental Defense Fund's claim that an exemption from a federal hazardous waste statute should be narrowly read. Several of Stevens' votes against positions favored by environmentalists supplied the critical fifth vote for the majority's adverse ruling, including *United States v. New Mexico*,⁴⁰ *Industrial Union v. American Petroleum*,⁴¹ and *Japan Whaling Ass'n*.⁴²

For almost all of the Justices, a similar pattern is evident. Whatever the particular Justice's reputation, significant counterexamples are available. Whether it is Justice Brennan, authoring the environmentalist's nightmare of a dissent in *San Diego Gas Electric v. City of San Diego*,⁴³ which subsequently became the Court's holding in *First English Evangelical Church v. County of Los Angeles*,⁴⁴ or Justice O'Connor, dissenting in *First English*,⁴⁵ and in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*,⁴⁶ in which she supported NRDC's more envi-

32. 480 U.S. 470 (1987).

33. 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

34. 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting).

35. 456 U.S. 305, 322 (1982) (Stevens, J., dissenting).

36. 464 U.S. 312, 344 (1984) (Stevens, J., dissenting).

37. 480 U.S. 572, 594 (1987) (Stevens, J., dissenting).

38. 438 U.S. 104, 138 (1978) (Rehnquist, Burger, Stevens, JJ., dissenting).

39. 511 U.S. 328, 340 (1994) (Stevens, J., dissenting).

40. 438 U.S. 696 (1978).

41. 448 U.S. 607 (1980).

42. 478 U.S. 221 (1986).

43. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

44. 482 U.S. 304 (1987).

45. See *id.* at 322 (O'Connor, J., joining in part, Stevens & Blackmun, JJ., dissenting).

46. 470 U.S. 116, 165 (1985).

ronmentally protective reading of the Clean Water Act, while Justice Brennan did not.⁴⁷

2. A more quantitative approach to the Justices' voting suggests, however, some discernible patterns and tendencies in the votes of the Justices in environmental cases. These tendencies may or may not be sufficiently strong to suggest a correlation between the votes and overarching labels such as "conservative" or "liberal." But, in either event, they strongly suggest that, at least for some justices, the environmental dimension of the case is relevant to how the Justice casts his or her vote in that case.

The objective of this analysis is to construct a scoring system somewhat reminiscent of that employed by the League of Conservation Voters Test in scoring members of Congress on environmental matters.⁴⁸ Here, however, it is applied to the Justices. A Justice is awarded one point for each pro-environmental protection outcome for which the Justice voted. The final score, referred to as an "EP score," is based on the percentage of pro-environmental votes the Justice cast, out of those cases in which that Justice participated. For the purposes of calculating this score, the entire database of 243 cases is not used. The scores are instead based on a subset of approximately 100 cases, representing those cases that are more susceptible to being assigned a pro-environmental position.⁴⁹ An EP score of 100 means that a Justice voted for the environmentally-protective outcome in all the cases in which she participated. A score of zero means that the Justice voted for that environmental outcome in none of the cases.

With regard to those Justices who were the most environmentally-protective, the scores are both easy and not surprising in their results.⁵⁰ The highest score went to Justice Douglas, who

47. Justice Brennan joined Justice White's majority opinion, supplying the needed fifth vote for EPA and against NRDC. *See id.* at 116.

48. *See* League of Conservation Voters, *League of Conservation Voters National Environmental Scorecard* at <http://www.lcv.org/scorecards/index.htm> (last visited May 28, 1999).

49. The cases upon which the EP Scores are based are those listed in italics in the appendix.

50. The EP scores for the nineteen Justices who have served on the Court since October Term 1969 are Chief Justice Burger (34.3), Justices Black (75), Blackmun (50.3), Brennan (58.5), Breyer (66.6), Douglas (100), Ginsburg (63.6), Harlan (33.3), Kennedy (25.9), Marshall (61.3), O'Connor (30.4), Powell (30), Chief Justice Rehnquist (36.5), Scalia (13.8), Souter (57.1), Stevens (50.6), Stewart (42.6), Thomas (20), and White (36.3). For a full description of the database upon which the EP analysis was performed, see Richard J. Lazarus, *Restoring What's "Environmental" About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000).

scored 100. Justice Douglas may well be the only environmental Justice ever on the Court, at least in modern times. Notwithstanding his high profile, Justice Douglas was, as a practical matter, barely there for modern environmental law. He was off the Court by 1975, and plagued by serious health problems during his final time on the Court. As a result, he voted in only fifteen of the 100 cases surveyed for the EP Score.

The highest EP scores for those Justices serving on the Court for substantial time are those of Justices Brennan (58.5), Marshall (61.3) and Stevens (50.6).⁵¹ Each of their scores, however, is much lower than Douglas' score. None of these other scores is sufficiently high to suggest that the environmental protection dimension of the various cases before the Court was a factor influencing their respective votes.

The EP scoring analysis further identifies more Justices with potentially revealing EP scores on the *low* end, suggesting some possible skepticism, or perhaps even hostility, towards environmental protection concerns or the kind of legal regime such concerns promote. There are many EP scores below thirty-three, a number below thirty, and two below twenty-five. As with the high EP scores, there is a hands-down winner, though no score of zero to equal Justice Douglas' score of 100. And, as with Justice Douglas, there are no surprises at the lowest of the low end.

The low score goes to Justice Scalia with a score just below fourteen, which is strikingly low. It is a score so low that one can fairly posit that Justice Scalia perceives environmental protection concerns as promoting a set of legal rules antithetical to that which he favors. Indeed, the kind of legal system promoted by environmental law seems to be of sufficient concern that it even prompts Justice Scalia sometimes to abandon his views on core matters involving constitutional and statutory interpretation.⁵²

51. Although the cases upon which the EP scores are based appear in the appendix, *infra*, the full related database, including the voting breakdown in each of those cases, the case topic, the identity of the legal position in each case that received a point, and the final EP scores of each of the Justices, is not separately published here because of its substantial length. It instead appears in Richard J. Lazarus, *Restoring What's "Environmental" About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000).

52. Justice Scalia's opinion for the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992), embracing an interpretation of the Fifth Amendment based on "our constitutional culture," and his dissenting opinion in *Public Utility District No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 724 (1994) (Scalia, J., dissenting), reaching for a construction of the Clean Water Act favored by industry, are illustrative. See 511 U.S. at 723 (Stevens, J., concurring) ("While I agree

What about Kennedy, the Court's current bellwether Justice who has been in the majority in virtually every environmental case before the Court since he joined the bench? His score is just below twenty-six, which is the third lowest out of nineteen Justices over the past thirty years. Although Justice Kennedy's score may well mask some significant potential for a future shift,⁵³ it should be unsettling for environmentalists to learn that a score of twenty-six represents the Court's current point of equilibrium.

3. Finally, viewed over time, the EP scores of the Justices indicate that the Court as a whole is steadily becoming less responsive to environmental protection. Indeed, the overall shift in the fate of environmental protection before the Court during the past three decades is telling.⁵⁴ In 1975, there were no Justices sitting on the Court with scores below thirty. Today, there are three with scores of thirty or below (Kennedy, Scalia, and Thomas) and two with scores of twenty or below (Scalia and Thomas).⁵⁵

II. The Supreme Court's Apathy and Possible Antipathy Towards Environmental Protection: Lessons for the Current and Future Environmental Lawyer

The overall trends suggest a troubling result for those looking to the Court to have an affirmative interest in promoting environmental protection. Environmental protection concerns implicated

fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case.").

53. Although Justice Kennedy's writing in the area remains sparse, he filed concurring opinions in three cases in which he expressed views that create at least the theoretical possibility of his breaking away from Justice Scalia's approach. *See* *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1032 (Kennedy, J., concurring); *Lujan v. Defenders of Wildlife*, 504 U.S. at 579 (Kennedy, J., concurring); *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2154 (1998) (Kennedy, J., concurring). *See* Richard Lazarus, *Balance May Shift Against Scalia*, ENV'TL FORUM 8 (May/June 1999).

54. These comparisons are based on the Justices' EP scores for their entire careers and not their EP scores as of the precise date to which the text refers. A reference to the EP scores of the Justices in 1975, therefore, considers the career EP scores of all the Justices who were serving on the Court in 1975, which will include their votes before and after 1975. The 1975 date simply determines the identity of the relevant Justices and does not confine the database with regard to precedent for purposes of calculating EP scores.

55. One must be careful, however, about too quickly equating the votes of individual Justices with Court rulings. The two do not necessarily correlate. For instance, forty environmentally favorable votes could reflect five unanimous rulings or nine five-four rulings. For that same reason, thirty environmentally favorable votes could reflect six favorable Court rulings and, therefore, more than forty environmentally favorable votes.

by a case appear, at best, to play *no favored* role in shaping the outcome. But nor does the outcome seem wholly neutral or indifferent to the presence of those concerns.

Over the past three decades, environmental protection concerns seem increasingly to be serving a *disfavored* role in influencing the Court's outcome. The preferred outcome is one that places less, rather than more, weight on the need to promote environmental protection. The Court's decisions, and the attitudes of the individual Justices, reflect increasing skepticism of the efficacy of environmental protection goals and the various laws that seek their promotion. This analysis leads to two significant conclusions worth further analysis.

The first conclusion relates to the relative absence of any notion, for most of the Justices during the past three decades, that environmental law is a distinct area of law, as opposed to just a collection of legal issues incidentally arising in a factual setting where environmental protection concerns are what is at stake. The Court's opinions lack any distinct environmental voice. Missing is any emphasis on the nature or character of environmental protection concerns and their import for judicial construction of relevant legal rules. The Court's decisions in *TVA v. Hill*,⁵⁶ *City of Chicago v. Environmental Defense Fund*,⁵⁷ and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁵⁸ all represent significant, albeit rare, victories for environmental concerns in the Supreme Court. In none of those rulings, however, do those concerns play an explicit positive role, if any, in the Court's analysis.

Imagine, however, if Justice Douglas were on the Court and writing any of the Court's opinions in those three cases. The Court's rhetoric regarding environmental protection and its legal relevance would be far different. Recall his genuine passion in dissenting in *Sierra Club v. Morton*,⁵⁹ in favor of expansive notions of legal standing on behalf of "inarticulate members of the ecological group" (e.g. animals) where he argued in favor of legal doctrine providing a voice in court "all of the forms of life . . . the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams."⁶⁰ Or consider Justice Black's emotional dissent in *San Antonio Conservation Society v. Texas*

56. 437 U.S. 153 (1978).

57. 511 U.S. 328 (1994).

58. 515 U.S. 687 (1995).

59. 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

60. *Id.* at 752.

Highway Commission,⁶¹ in which he decried cars “spew[ing] forth air and noise pollution,”⁶² he warned of mothers “grow[ing] anxious . . . lest their children be crushed beneath the massive wheels of interstate trucks,”⁶³ and he described environmental laws as safeguarding “our Nation’s well-being and our very survival.”⁶⁴ Such emotion has meaning when it comes from the Supreme Court.

For most of the Court, most of the time, environmental law has become no more than a subspecies of administrative law, raising no special issues or concerns worthy of distinct treatment as a substantive area of law. Environmental protection is merely an incidental context for resolution of a legal question. Recall again Justice White’s decision to side with EPA in *Chemical Manufacturers Ass’n v. NRDC*,⁶⁵ upholding the validity of variances for technology-based standards otherwise applicable to discharges of toxic effluent. He stressed in his note to Justice Marshall that resolution of the case did not make much of a difference to administrative law one way or the other.⁶⁶

What are the practical implications of the Court’s approach to environmental law for someone wanting to be an environmental lawyer, or a lawyer concerned about environmental protection? First, to be an outstanding environmental lawyer requires your being an excellent lawyer. That means a law student zealously pursuing a career in environmental law should not just concentrate on taking “environmental law” classes. Master the “wilderness” of administrative law.⁶⁷ Delve into the complexities of federal courts and federal jurisdiction—likely the most important course many environmental public interest litigators take in law school. Similarly, approach courses in corporations, tax, securities, and real estate law. More often than not, the fate of the environmental interests will turn on the resolution of legal issues rooted deeply in these other areas of law.

Likewise, as legal counsel, do not approach cases with environmental blinders on. Be ready to see and understand the case or controversy in its broader legal context. And be ready to

61. 400 U.S. 968 (1971) (Black, J., dissenting).

62. *Id.* at 969.

63. *Id.*

64. *Id.* at 971.

65. 470 U.S. 116 (1985).

66. See *supra* note 14, and accompanying text.

67. See David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

master that broader legal context. Do not just read environmental cases. An environmental lawyer is likely to find the most important, most relevant precedent elsewhere, precisely because it is elsewhere.⁶⁸

Indeed, because of environmental protection's apparent disfavored status, the precedent most supportive of an environmentally-protective outcome frequently can be found in cases where the favorable implications for environmental protection concerns are *not* at all immediately obvious. The challenge of the environmental lawyer is to discover and exploit (and, when necessary, distinguish) that potentially relevant precedent. It may be in nonenvironmental standing cases such as the Supreme Court's recent decision in *Federal Election Commission v. Akins*,⁶⁹ which supports broadened standing in environmental cases involving information reporting requirements;⁷⁰ or nonenvironmental regulatory takings cases such as *Eastern Enterprises v. Apfel*,⁷¹ in which Justice Kennedy advances a more restricted approach to regulatory takings doctrine that could aid environmental regulators faced with such constitutional challenges.⁷²

The second closely related lesson for the environmental lawyer is the importance of being strategic in framing and presenting environmental cases in litigation. An environmental lawyer, especially one representing interests that support enhanced environmental protection measures, should not mistake her motivation and interest in the case for what is likely to prompt a favorable outcome in an administrative or judicial setting. The environmental lawyer must be open to the possibility that it may *not* be in her client's strategic interest to emphasize the environmental protection dimensions of the case at all.

68. For example, the Supreme Court's ruling this past Term in *Saenz v. Roe*, 119 S. Ct. 1518 (1999), resurrecting the Fourteenth Amendment's Privilege and Immunities Clause to strike down California's cap on welfare payments for new residents, may well trigger a new wave of constitutional challenges brought by property owners against environmental regulators based on that same Clause. See Carrie Johnson, *The Road to Saenz v. Roe*, 22 THE LEGAL TIMES 1, May 24, 1999; Clint Bolick, *Back from the Grave—The Supreme Court Exhumes the 14th Amendment's 'Privileges or Immunities' Clause*, 22 THE LEGAL TIMES 19, May 17, 1999.

69. 524 U.S. 11 (1998).

70. See Cass Sunstein, *Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613-15, 621-24, 651-52, 663-69 (1999).

71. 524 U.S. 498, 539-47 (1998).

72. See 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in part and dissenting in part); Richard Lazarus, *Balance May Shift Against Scalia*, ENV'T'L FORUM 8 (May/June 1999).

An advocate needs, of course, to focus the decisionmaker on her best legal or policy arguments. Those that the advocate cares about, however, may not be those likely to motivate the decisionmaker towards the preferred outcome. Like any good lawyer, the environmental lawyer needs to identify and address the decisionmaker's concerns, and not make the mistake of assuming that she shares the advocate's own.

The current Court is, at the very least, not a Court comprised of Justices looking at cases as "environmental law" cases. Other crosscutting issues are more likely to influence their votes rather than the environmental protection implications of one result over another. What the Justices believe, for instance, should be the relationship between courts and administrative agencies regarding matters of statutory construction, or, the relationship between states and the federal government in their respective areas of law-making. The Justices strive for consistency on these crosscutting issues that apply in a variety of contexts, of which environmental law seems to be just one of many.

Different cases therefore require different strategies. For Justice Scalia, it may well be to turn the case into a plain meaning case, or a nonlegislative history case.⁷³ Indeed, for Scalia, there may well be reason *not* to emphasize the positive environmental protection implications of the side that you are promoting. For the Chief Justice, it may well be to emphasize judicial integrity concerns, including the autonomy of trial courts, the costs of fragmented litigation, premature judicial decision making, and possible burdens on the federal judiciary.⁷⁴ For Justices Kennedy and O'Connor, it may well be the federalism implications of a particular outcome, *stare decisis*, concerns with judicial activism, and the sheer inequities of a particular result.

73. See, e.g., *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 15-19 (1995).

74. The Chief Justice's concerns with preserving state sovereignty in the Dormant Commerce Clause cases is one obvious example. See notes 23 to 32, *supra*, and accompanying text. Similar concerns seem to temper Rehnquist's views on the regulatory takings issue. See Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Regulatory Takings Cases*, 38 WM. & MARY L. REV. 1099, 1111-14 (1996); Letter from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr., *Re: Agins v. City of Tiburon* (May 29, 1980) (Official Papers of the Chambers of Justice Thurgood Marshall) ("I am somewhat uneasy about the latitude which your treatment of federal constitutional review of local zoning ordinances on pages 5 and 6 of your present draft appears to give federal courts."). *Id.*

The more fundamental issue is whether, regardless of the strategic advantages of thinking outside the “environmental” box in environmental litigation, such a stripping of the “environment” out of environmental law is a positive or appropriate development for environmental law. My short answer is the law professor’s classic “yes and no.” Some stripping is appropriate, but not to the extent that has occurred in the Supreme Court.

Why is it partially appropriate? Simply because the Justices’ natural instinct about environmental law is partially correct: Environmental law does not exist in a vacuum. Environmental law issues do arise in contexts that implicate other, very important crosscutting areas of law, such as administrative law, corporate law, Tenth Amendment law, Fifth Amendment law, and criminal law.

Nor is it happenstance that environmental law constantly arises in these other contexts. So many different kinds of activities implicate environmental protection concerns that the legal requirements serving that end must necessarily be widely applicable. Those legal requirements also necessarily create friction by restriking balances previously reached by other pre-existing legal rules governing that same activity. By promoting rapid change in the law in response to increased public demands for environmental protection, environmental law necessarily places great pressure on lawmaking institutions and generates conflicts between competing lawmaking fora, between sovereign authorities (local, state, tribal and federal) and within their respective executive, judicial, and legislative branches.

The Justices’ focus in the first instance on these crosscutting issues is also quite proper. The Justices should strive for consistency in their resolution. There should *not* always be one answer if environmental protection is at stake; and another answer if not. Such singularly outcome-dependent judicial reasoning could seriously undermine the law’s essential integrity and legitimacy.

But that is not to say that environmental protection concerns are irrelevant when addressing those crosscutting issues. Such concerns legitimately inform the judicial resolution of those issues and sometimes justify striking a new and different balance. Environmental protection concerns need not always be a dispositive factor to be legitimately so in some instances, and always to remain a relevant factor for separate consideration.

In the early 1970s, the Court appeared to understand the broader implications of the nation’s commitment to a legal regime

for environmental protection. The Court seemed to recognize its responsibility to account for the corresponding evolutionary pressures being triggered by that emerging legal regime on other intersecting areas of law and on lawmaking institutions. Since then, the Court has too often mistakenly equated the judiciary's involvement with such traditional, legitimate legal evolution with the 1980s judicial bugaboo of "judicial activism."

The cost of this mistaken belief is substantial. The Court deprives itself of its ability to consider the sheer importance of environmental protection to the issues before the Court. Even more fundamentally, the Court fails to consider how the special challenges that environmental protection presents may warrant evolution in legal doctrine.⁷⁵

The Court's treatment of the issue of standing during the past three decades is emblematic of its attitude towards environmental law. The Court originally relaxed standing requirements in response to the special challenges presented by environmental law.⁷⁶ The Court revised the standing doctrine in recognition of the nature of the injuries at stake in environmental litigation being neither clearly economic nor physical.⁷⁷ The Court likewise took special account of the inevitable, uncertain and speculative nature of such injuries, in particular, the more attenuated chain of causation between action and injury.⁷⁸

In recent years the Court has handed down a series of standing rulings that fails to consider these challenges and, as a result, makes it especially difficult for plaintiff citizens to maintain envi-

75. To be sure, one can perceive snippets of environmental law's influence in rare, isolated opinions of the Justices. Not surprisingly, Justice Douglas was most apt to see the relationship. For instance, in two cases in 1972, *Salyer Land Co. v. Tulare Lake Basin Water*, 410 U.S. 719 (1972) and *Associated Enterprises, Inc. v. Toltec Watershed Improvement*, 410 U.S. 743 (1972), the Court ruled that equal protection was not violated by a state statute that excluded tenants and permitted only landowners to vote for candidates for the water storage district and weighed their votes according to the value of the land each owned. Justice Douglas perceived the cases differently than the majority precisely because he understood the role that water played in the lives and ecosystem of the affected tenants. See 410 U.S. at 749 ("It is also inconceivable that a body with the power to destroy a river by damming it and so deprive a watershed of one of its most salient environmental assets does not have 'sufficient impact' on the interests of people generally to invoke the principles of [this Court's voting rights precedent]"). *Id.*

76. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 658-64 (1986).

77. See *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

78. See *United States v. S.C.R.A.P.*, 412 U.S. 669, 685 (1973).

ronmental lawsuits. The trend has been so plain that it even prompted Justice Blackmun to question openly in dissent why the Court systematically disfavored environmental plaintiffs in the law of standing.⁷⁹

Another area is the law of regulatory takings. Here too, the Court's early case law suggested an appreciation for how environmental protection and natural resource conservation concerns might justify a rethinking of the nature of private property rights in natural resources.⁸⁰ But, the Court has since seemed more attracted to a view of property that is static, not dynamic, and therefore restricts the legislature's constitutional authority to promote environmental protection.⁸¹

Standing law and regulatory takings law are just two of the more obvious examples. The Court's need to consider the lessons supplied by environmental law in addressing crosscutting issues extends to less obvious areas as well, such as corporate law. During the October 1997 Term, for instance, in *United States v. Bestfoods*,⁸² the Court faced the question under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁸³ of the liability of a parent corporation for the actions of a subsidiary. What was striking about the oral argument before the Court was that the Justices were uniformly aware and sympathetic to the important policy objectives underlying corporate law's limited liability rules, but were not similarly aware of environmental law's competing concerns. Indeed, members of the Court appeared shocked to learn from both government and industry counsel, the undisputed common ground regarding congressional intent in CERCLA in terms of corporate liability.⁸⁴

79. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting) ("I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing.") *Id.* After the presentation of this Garrison Lecture and immediately before this article went to final press, the Supreme Court took an anticipated, yet important, step toward reversing this trend in a ruling noted later in this article. See *infra*, note 108.

80. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Penn Central v. City of New York*, 438 U.S. 104 (1978); *Andrus v. Allard*, 444 U.S. 51 (1980).

81. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

82. 524 U.S. 51 (1998).

83. 42 U.S.C. §§ 9601 *et seq.* (1999).

84. Official Transcript of the Oral Argument before the United States Supreme Court, *United States v. Bestfoods*, No. 97-454, pp. 16-17, 1998 U.S. Trans. LEXIS 61

III. Bringing the "Environment" Back to Environmental Law: *Friends of the Earth v. Laidlaw Environmental Services*

The important remaining question is whether existing trends in the Court's approach to environmental law can be changed. Past experience strongly suggests that the answer to that question may well depend on both the life experiences (professional and personal) that the current and future Justices bring with them to their work. It is no coincidence that the only Justice with a significantly high EP Score (100) is Justice Douglas, whose deeply-held views favoring environmental protection restrictions find their roots in his life-long involvement with the natural environment as an avid hiker and outdoorsman.⁸⁵ No current Justice has comparable links to the natural environment in general or to either resource conservation or environmental protection matters more particularly.⁸⁶

Perhaps the short answer to the question of how best to restore the "environment" to environmental law in the Court might be to find some way to provide individual Justices with personal experiences that allow them to appreciate more fully the environmental stakes of the cases before the Court. But putting aside such extra-judicial influences, the most viable basis for persuading the Justices of the need for placing greater weight on the environmental dimension of environmental law is going to be through the facts of the individual cases brought to the Court's attention. Each of those cases presents the Justices with a story about the way in which laws affect the quality of life. The cumulative effect of multiple stories can significantly affect the way the Justices decide what cases to hear and how then to decide the legal issues presented.

To the detriment of environmental protection concerns, the property rights movement has used this technique with enormous success. By bringing to the Court's attention during the past several decades a series of cases, the factual allegations of which appear to support their claim of environmental regulatory over-

(March 24, 1998) (argument of Ms. Schiffer, counsel for the United States EPA); *id.* at 26-27 (argument of Mr. Geller, counsel for Bestfoods).

85. See WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN*, 203-36 (Delta Pub. 1974).

86. The only current Justice with such possible strong personal ties to the natural environment might be Justice David Souter, based on his reputation as a hiker. See David Margolick, *Bush's Court Choice: Ascetic at Home But Vigorous on Bench*, N.Y. TIMES, July 25, 1990, at A1:3.

reaching, such as claims of economic wipe-outs,⁸⁷ or wheelchair-bound, blind widows being denied the right to build a dream home,⁸⁸ these advocates have successfully fostered a general judicial skepticism about the reasonableness of environmental laws.

It is, of course, that same judicial skepticism that environmentalists and environmental regulators must now overcome. Environmentalists and environmental regulators face a conundrum. As previously described, it is likely often not in their short term strategic interests to emphasize the environmental dimension of a case because of the Court's current skepticism. But, unless environmentalists begin to tell their own story to the Justices, they are unlikely to dispel that skepticism in the longer term. A simultaneous accomplishment of those two often conflicting objectives will not be easy. It will require careful case management and case selection to bring to the Justices' attention cases that both instruct the Court on the important policies and values safeguarded by environmental protection laws and explain how such safeguarding is entirely consistent with our nation's legal traditions.

There is currently at least some reason for optimism that the Court may be about to take an initial step in the right direction. The Court has agreed to review this October 1999 Term a potentially very important environmental case, *Friends of the Earth v. Laidlaw Environmental Services*.⁸⁹ The Fourth Circuit's ruling under review in *Laidlaw*⁹⁰ was an absolutely disastrous decision for environmentalists. But what made the lower court ruling so significant was that it was not so much the product of a mere aberrational court of appeals decision than it was suggestive of the jurisprudential signals that the Supreme Court has been sending out to the lower courts about the strict application of Article III case or controversy requirements to environmental citizen suits. For that same reason, however, the case provided the Court with the opportunity both to embrace the important role Congress intended for citizen suits to serve in environmental law and to strike a balance in constitutional Article III doctrine that is more accommodating to that congressional scheme.

87. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992).

88. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); see Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVT'L. L. 179, 184-86 (1997).

89. 525 U.S. 1176 (1999).

90. *Friends of the Earth v. Laidlaw Environmental Services*, 149 F.3d 303 (4th Cir. 1998).

In *Laidlaw*, the plaintiff, Friends of the Earth, brought a fairly routine citizen suit against an industrial facility owned by Laidlaw Environmental Services based on hundreds of violations of Laidlaw's Clean Water Act National Pollutant Discharge Elimination System permit, both by exceeding allowable mercury discharges and by violating monitoring and reporting requirements.⁹¹ No *Gwaltney*⁹² threshold jurisdictional problem was presented; no one disputed that the facility was in noncompliance both at the time the sixty day-notice and the subsequent lawsuit was filed. The trial took several years, however, and by the time the trial was complete, the company was no longer in noncompliance. The district court, accordingly, declined any request for injunctive relief, but imposed more than \$400,000 in civil penalties, payable to the U.S. Treasury, and expressly indicated that an attorney's fee award would similarly be forthcoming.⁹³

On appeal, however, the Fourth Circuit reversed.⁹⁴ The appellate court held that once the facility came into compliance, the case became moot.⁹⁵ No Article III jurisdiction existed, the court ruled, for either a civil penalties award or for an attorney's fee award.⁹⁶ The court, accordingly, ordered dismissal of the action in its entirety, an absolutely dramatic result. Consider the perverse incentive the appellate court's reasoning provides a regulated facility. So long as the facility comes into compliance prior to final judgment in a citizen suit enforcement action, a facility that has long been in violation of the federal environmental law, both before and after the filing of the complaint, cannot be subject to either a civil penalty or an attorney's fee award. The incentive to comply prior to suit is dramatically reduced. Also sharply reduced, if not wholly eliminated, is the longstanding incentive that defendants in environmental citizen suits have historically had to settle their cases. Such settlements have led to defendants' pay-

91. See *Friends of the Earth v. Laidlaw*, 956 F. Supp. 588, 600-01, 610 (D. S.C. 1997).

92. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), the Court held that Clean Water Act citizen suits could not be maintained for wholly past violations of that Act. See *id.* at 56-63. A plaintiff need, at a minimum, set forth in the complaint good faith allegations of violations ongoing at the time that the complaint is filed. See *id.* at 64-65.

93. See 956 F. Supp. at 610-11.

94. See 149 F.3d 303 (4th Cir. 1998).

95. See *id.* at 307.

96. See *id.* at 306-07. The court's attorney's fee decision was especially remarkable given that the court accompanied its ruling with a "but see" cite to the Supreme Court's decision in *Gwaltney*. See *id.* at 307.

ing hundreds of millions of dollars to support environmentally beneficial projects.⁹⁷

From a purely historical perspective, the Court's granting certiorari in *Friends of the Earth* was, standing alone, of surprising significance. The Court has heard almost 250 environmental cases on the merits during the past thirty years, yet this was only the second time that the Court granted a citizen suit petition in an environmental case at the sole request of the citizen plaintiffs. To be sure, the Justices have frequently done so at the behest of industry.⁹⁸ Likewise, they have often granted review at the request of federal, state and local governments.⁹⁹ But it has been twenty-seven years since the Court last granted review at the exclusive request of environmental plaintiffs, and that was in *Sierra Club v. Morton*¹⁰⁰ in 1972.

There is also good reason to believe that the Court granted review in *Friends of the Earth* to rule in favor of the environmental plaintiffs. It takes four votes to grant review and it is unlikely that the four votes this time came from Justices seeking to affirm the Fourth Circuit's analysis. A Justice seeking to make it harder for environmental plaintiffs to bring suits would not pick this case. This is a case presenting a record in which the trial court

97. See Jeff Ganguly, Comment, *Environmental Remediation Through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement*, 26 B.C. ENVTL. AFF. L. REV. 189 (1998); Laurie Droughton, Comment, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789 (1995).

98. Two recent examples include *The Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998), and *Bennett v. Spear*, 520 U.S. 154 (1997), but there are many during the past three decades. See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87 (1983); *Chevron v. NRDC*, 467 U.S. 837 (1984); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1988).

99. See, e.g., *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *California v. Sierra Club*, 451 U.S. 287 (1981); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1982); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1982); *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

100. *Sierra Club v. Morton*, 405 U.S. 727 (1972). The closest exception is provided by *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). But, in *Hallstrom*, the Court granted certiorari (489 U.S. 1077 (1989)) only after asking the Solicitor General of the United States about the advisability of granting review (see 488 U.S. 811 (1989)) and then only after the United States filed a brief both advising the Court to hear the case on the merits and to rule against the environmental petitioners (see Brief for the United States as Amicus Curiae in *Hallstrom v. Tillamook County*, No. 88-42 (filed February 17, 1989)), which the Court then did.

found hundreds of violations occurring over many years.¹⁰¹ The violations, moreover, involve discharges of mercury; not substances seemingly innocuous to a layperson or to a lay Justice. Mercury is a highly toxic substance that persists, rather than degrades, in the natural environment.¹⁰² The record further shows that the district court imposed a hefty fine of several hundreds of thousands of dollars, after finding that the company had enjoyed an economic benefit of over one million dollars because of those violations.¹⁰³

A Justice seeking to erect mootness or other Article III barriers to citizen suit enforcement would look for a case with a very different record. Far preferable would be a case involving more seemingly innocuous pollutants,¹⁰⁴ in order to both bolster possible suggestions of the frivolousness of the lawsuit and the lack of necessity for citizen suit enforcement overall. Finally, no clear circuit conflict was presented by the petition for a writ of certiorari because the Fourth Circuit relied upon a recent Supreme Court ruling, *The Steel Co. v. Citizens for a Better Environment*, not yet considered in this identical context by other circuits.

Of course, four votes do not a majority make. The necessary five-vote majority for the environmental plaintiffs in *Friends of the Earth* seems clearly in reach, however, in light of the Justices' past voting record. In particular, at least two Justices, Kennedy and O'Connor, seem quite open to the environmental plaintiff's contention that the lower court misapplied mootness doctrine. Article III jurisdictional requirements is an area where both Justices have written and/or joined separate opinions that reflect greater awareness of the need for legal doctrine to evolve in response to the special concerns raised by the demands of environmental protection. Justice O'Connor actually dissented in *Lujan v. Defenders*

101. See 956 F. Supp. at 600-01.

102. See ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION—LAW, SCIENCE, & POLICY 475 (1996).

103. See *id.* at 610-11, 613.

104. For example, some in the environmental community strongly urged the environmental plaintiffs in *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997) not to seek Supreme Court review. Although environmentalists were unanimously of the view that the Third Circuit's ruling on standing in *Magnesium Elektron* was very harmful, legally erroneous, and could form the basis of a strong petition for a writ of certiorari, there was far less agreement on the essential strategic inquiry whether the case presented the facts needed to make that legal argument in the strongest possible light. A substantial proportion of the alleged violations of the Clean Water Act at issue involved discharges of salt and heat. See *id.* at 115.

of *Wildlife*, and joined Blackmun's opinion, which denounced the majority for its "slash and burn" of the law of environmental standing.¹⁰⁵ Kennedy, the current bellwether Justice for determining the majority ruling,¹⁰⁶ joined most of the majority opinion in that same case, but he also wrote separately to stress, along with Justice Souter, how environmental protection concerns might justify Congress' allowance of less concrete injuries and more attenuated chains of causation without offending Article III of the Constitution.¹⁰⁷

Were both Justices Kennedy and O'Connor to fashion a majority with Justices Stevens, Breyer, Souter, and Ginsburg on the issues before the Court in *Friends of the Earth*, the resulting opinion could begin to restore what makes environmental law "environmental." The Court could acknowledge that environmental protection concerns warrant rethinking the way that Article III standing and mootness requirements are understood and applied. At the very least, the case represents an all-too-rare opportunity for the Court to take a positive step in that direction.¹⁰⁸

105. 504 U.S. at 606 (Blackmun, J., dissenting).

106. See *supra* note 16 to 21 and accompanying text.

107. See 504 U.S. at 580 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (Kennedy, J., concurring).

108. Subsequent events reveal that such a positive step has now been taken. The Supreme Court had granted certiorari in *Friends of the Earth* on March 1, 1999 (see 525 U.S. 1176 (1999)), which was a few days before the delivery of this Garrison Lecture. The case was argued in October 1999, several months after the written manuscript for publication was complete. On January 12, 2000, just as this article was going to final press, the Court announced its decision in the case. See *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693 (2000). As anticipated, the Court rejected the Fourth Circuit's mootness ruling. See 120 S. Ct. 693, 697 (1999). The Court, moreover, also rejected Laidlaw's effort to defend the court of appeals' judgment on the alternative ground that *Friends of the Earth* lacked Article III standing. See *id.* The Court rejected Laidlaw's contention that a citizen suit plaintiff must demonstrate actual injury to the natural environment. The Court ruled that injury to the *environment* is not the relevant inquiry for standing, which should instead be whether the *plaintiff* has been injured. According to the Court, moreover, *Friends of the Earth* had established such injury by establishing that their members' reasonable concerns about the possible effects of the unlawful discharges had affected adversely their willingness to use the waterway at issue. See *id.* at 698. The Court further ruled that, because of their future deterrent effect, civil penalties could provide sufficient redress for citizen suit standing purposes even when the defendant was currently in compliance and those penalties were payable exclusively to the federal treasury. See *id.* The court's opinion departs significantly from some of the broader implications in the Court's recent standing precedent, adverse to environmental citizen suit plaintiffs, discussed in this article's text. Justice Ginsburg authored the Court's opinion, joined by six others, including Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. Justice Scalia filed a dissenting

IV. Conclusion

Bringing the "environment" back to "environmental law" is, of course, a long and not a short term undertaking. Even a ruling in a single case such as *Friends of the Earth v. Laidlaw* is only that: A single ruling in a single case. It is a far cry from a reversal of the trend disfavoring environmental protection that is apparent in the Court's decisions during the past three decades.

Nor will the longer term restoration, now warranted, occur as a result ultimately of the efforts of environmental lawyers of my generation, or the efforts of David Sive, Joe Sax, Bill Rodgers, or Ollie Houck. It will depend largely on the future efforts of today's law students, such as those here at Pace and at other law schools, who are about to embark on a career in environmental law.

Environmental lawyers of my generation found inspiration in the work of those who came before us, including Lloyd Garrison. All I can hope for is that today's law students include some who will find the necessary inspiration in the work of those within my own generation of environmental lawyers and scholars; that they will be thoughtful, strategic advocates for environmental law's important goals, and that they will work towards environmental law's restoration in our nation's highest court.

Appendix Environmental Cases Decided By The United States Supreme Court October Term 1969- October Term 1998

| Cite | Name** | Year Decided |
|--------------|--|--------------|
| 397 U.S. 88 | Arkansas v. Tennessee | 1970 |
| 397 U.S. 620 | Choctaw Nation v. Oklahoma | 1970 |
| 400 U.S. 48 | <i>Hickel v. Oil Shale Corp.</i> | 1970 |
| 401 U.S. 402 | <i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> | 1971 |
| 401 U.S. 493 | <i>Ohio v. Wyandotte Chemicals Corp.</i> | 1971 |
| 401 U.S. 520 | United States v. District Court in and for the County of Eagle | 1971 |

opinion, which Justice Thomas joined. The favorable outcome in the Supreme Court would seem to confirm the wisdom of the environmentalist strategy of not seeking review in earlier cases presenting far less favorable facts. See note 104, *supra*.

** *Italicized* case names are those used in the "EP" scoring.

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